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No.

in the
Supreme Court
of the
United States

OCTOBER TERM 1982

RICHARD HOWARD EHLINGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether a defendant's right to due process of law and fundamental fairness is violated when he is found guilty of participation in a narcotics conspiracy and his conviction is affirmed by an appellate court where the prosecutor argued that suppressed evidence not introduced at trial belonged to the defendant and indicated the defendant's guilt.

LIST OF INTERESTED PERSONS

The only persons having an interest in this case are the Petitioner, his family, and the United States of America.

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Petitioner, RICHARD HOWARD EHLINGER, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on September 23, 1982, and December 15, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto, but was not reported in the official reporters. The Court of Appeals denied the petition for rehearing on December 15, 1982, which is also reproduced in the Appendix. The District Court did not render any written opinions specifically directed to this case.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered September 23, 1982. The appellate court denied the petition for rehearing on December 15, 1982. The appellate court then entered an order staying issuance of the mandate pending the timely filing of a certiorari petition and disposition thereof by this Court. The petition is filed within the authorized time period. Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment V:

**No person shall . . . be deprived of life, liberty,
or property without due process of law . . .**

Title 21 U.S.C. §841:

**(a) Except as authorized by this subchapter, it
shall be unlawful for any person knowingly or
intentionally —**

**(1) to manufacture, distribute, or dispense,
or possess with intent to manufacture, distribute,
or dispense, a controlled substance; . . .**

Title 21 U.S.C. §846:

**Any person who attempts or conspires to commit
any offense defined in this subchapter is
punishable by imprisonment or fine or both
which may not exceed the maximum punishment
prescribed for the offense, the commission of
which was the object of the attempt or
conspiracy.**

STATEMENT OF THE CASE

RICHARD HOWARD EHLINGER and five other individuals not parties to this proceeding, Eugene Fox, Gerald Todd, Carl Leslie, Michael Moore, and Walter Wickert, were charged in a two-count indictment dated January 26, 1981, of conspiring to intentionally and knowingly possess with intent to distribute a quantity of a scheduled I controlled substance, to-wit: marijuana (Count I), and for knowingly and intentionally possessing with intent to distribute a controlled substance, to-wit: approximately 1,611 pounds of marijuana (Count II) arising out of an incident which took place on or about January 9, 1981. On May 13, 1981, the jury found **RICHARD HOWARD EHLINGER** guilty of Counts I and II of the indictment.

The government's investigation of this case began on January 9, 1981, at approximately 3:30 p.m. when special agents Edward Eledge and William Penny of the Drug Enforcement Administration (DEA), went to 2311 S.W. 66th Terrace, Ft. Lauderdale, Florida, where they met with co-defendant Todd and a confidential informant. Eledge and the confidential informant went to Todd's Winnebago, where Todd informed the special agent that a new load consisting of 28,000 pounds of marijuana was available. Negotiations then began in which a minimum purchase of 18 tons was discussed. During these negotiations, Todd told Eledge that 7 bales of wet marijuana were in a tractor-trailer elsewhere on the property.

Approximately an hour later, a Cadillac being driven by co-defendant Fox entered the area. **RICHARD HOWARD EHLINGER** was a passenger in that vehicle.

Both EHLINGER and Fox entered the Winnebago and met with Todd, Eledge, and the confidential informant. At that time, Fox discussed the sale of 28,000 pounds of marijuana for a purchase price of \$200.00 per pound.

According to special agent Eledge, Fox and EHLINGER then left the Winnebago, and went to a trailer. Approximately 5 to 10 minutes later, the Cadillac returned. He said that he observed EHLINGER at the Cadillac making calculations on what appeared to be a hand calculator.

Fox and EHLINGER then returned to the Winnebago. EHLINGER, according to the special agent, had the calculator tape and a spiral notebook in his possession. Once Fox and EHLINGER returned to the trailer, Eledge was informed that the 7 bails of marijuana located on the trailer were available for sale. Special agent Eledge then agreed that he would pay for each bale upon their arrival. Todd, Fox and Eledge then left the Winnebago without EHLINGER and proceeded to the trailer to look at the marijuana on board. While at the trailer, Fox discussed future deliveries of marijuana with the special agent.

At approximately 5:00 p.m., a white van being driven by co-defendants Moore and Leslie arrived at the scene. Fox pulled back the tarp on the van and cut open one of the bales of marijuana with a knife that had been given to him by Todd. Fox then instructed Leslie and Moore to take the keys to Eledge's van so that another load could be obtained.

Special agent Penny testified that after Leslie and Moore arrived with a van filled with marijuana, EHLINGER drove the van back to the trailer. The special agent admitted, however, that someone told EHLINGER to drive the van and he believed it was special agent Eledge. The special agent also testified that EHLINGER off loaded only a few bales and complained of back problems which precluded him from doing anything else. EHLINGER was supposed to have taken out a list that contained bale numbers and weights and checked the bales off the list as they were placed in the trailer.

After a pre-arranged signal, the arrest of Todd, Fox, and EHLINGER took place. When Leslie and Moore returned in Eledge's white van with a second load of marijuana at approximately 7:00 p.m., they were also arrested.

Prior to trial, RICHARD HOWARD EHLINGER filed a motion to suppress evidence seized from his briefcase. The trial court granted this motion and excluded all evidence concerning the briefcase's contents.

At trial, Penny testified that he found the inventory list during a search of EHLINGER which occurred at least five minutes after EHLINGER had been out of Penny's view. On cross-examination, however, Penny admitted that shortly after the arrest of EHLINGER the sheet of paper was reported to have been found "elsewhere than on Mr. Ehlinger's person" in a DEA report of seizure form.

It was the contention of the defense during closing argument that the government had failed to prove beyond a reasonable doubt that the list had been found in EHLINGER's possession since the special agent had signed reports stating he had found it elsewhere. The defense also argued that the evidence established the sheet of paper could not have been found on the defendant.

In rebuttal, the government argued that "there was absolutely no contention that the container [where Penny initially reported that the list was found] did not belong to Mr. Ehlinger." No evidence had been introduced at trial that suggested the list was found in a container. Indeed, defense counsel had carefully tailored his cross-examination to establish that the list was "found elsewhere." Defense counsel immediately objected and requested a mistrial, which was denied.

On appeal to the United States Court of Appeals for the Eleventh Circuit, RICHARD HOWARD EHLINGER argued that the prosecutor's reference to excluded evidence during his closing argument was improper, prejudicial, and plain error. In addition, the defendant also argued that the prosecutor's reference also commented on the defendant's Fifth Amendment right to remain silent.

The appellate court rejected these arguments. Regarding the comment on suppressed evidence, the court held that the record demonstrated a plausible explanation for the prosecutorial comment. The court also stated that it did not believe that the prosecutor had a manifest intention to comment on the defendant's failure to testify.

REASON FOR GRANTING THE WRIT

A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS IS VIOLATED WHEN HE IS FOUND GUILTY OF PARTICIPATION IN A NARCOTICS CONSPIRACY AND HIS CONVICTION IS AFFIRMED BY AN APPELLATE COURT WHERE THE PROSECUTOR ARGUED THAT SUPPRESSED EVIDENCE NOT INTRODUCED AT TRIAL BELONGED TO THE DEFENDANT AND INDICATED THE DEFENDANT'S GUILT.

The situation presented for review to this Court demonstrates that the Eleventh Circuit has departed from previous decisions in the Fifth Circuit and its sister circuits in requiring the petitioner to establish a "manifest intention" on the part of the prosecutor in his comment on the defendant's silence, or to establish that the jury would "naturally and necessarily" view the statement as a comment on the defendant's failure to testify. The case law does not support the path taken by the Eleventh Circuit and thus requires that this Court grant the Writ of Certiorari to review these new developments.

The law has traditionally been well settled that where a prosecutor makes reference to excluded evidence during closing argument, it is improper, prejudicial, and plain error, regardless of the government's case. *Garris v. United States*, 390 F.2d 862 (D.C. Cir. 1968); *United States v. Arendale*, 444 F.2d 1260 (5th Cir. 1971);

United States v. Phillips, 664 F.2d 971 (5th Cir. 1981);
United States v. Dorr, 636 F.2d 117 (5th Cir. 1980).

The cases of *Garris v. United States*, 390 F.2d 862 (D.C. Cir. 1968), and *United States v. Arendale*, 444 F.2d 1260 (5th Cir. 1971), demonstrate the erroneous treatment of the issue presented below to the Eleventh Circuit. In *Garris*, the prosecutor in closing argument commented on inadmissible hearsay testimony. The Fifth Circuit reversed the conviction, holding that a prosecutorial attempt to strengthen his case during closing argument by way of excluded testimony constituted plain error.

In *Arendale* the prosecutor commented in rebuttal on why it had not called a certain witness which the defense counsel had raised during its closing argument. The prosecutor explained that the additional witness would have been merely cumulative, but also stated what the absent witness allegedly knew or saw concerning the crime. The appellate court reversed, holding that no one led the prosecuting attorney into referring to the excluded hearsay. Indeed, the Court found that defense counsel had avoided that very area.

In the present case, a virtually identical situation occurred. The crucial evidence against RICHARD HOWARD EHLINGER at trial was the possession of the marijuana log sheet. The government's inability to establish when or from where this sheet was obtained, according to the defense, established a reasonable doubt.

The rebuttal of the government argued for the first time that there was no contention that the container

[where the list was initially reported found] and did not belong to Mr. Ehlinger. No evidence had been introduced at the trial relating to a container. Indeed, the only container involved in the case had already been suppressed during pre-trial motions. Defense counsel during his cross-examination of the special agent avoided any discussion of containers.

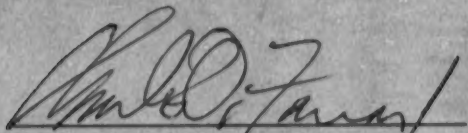
Rather than apply the standards enunciated in *Garris* and *Arendale*, the Eleventh Circuit ignored precedent and applied only the rule of *Williams v. Wainwright*, 673 F.2d 1182 (11th Cir. 1982), to this case. The requirement placed on the defendant to establish either a "manifest intention" of the prosecutor to comment on his silence, or to establish that the jury would naturally and necessarily consider it such a comment, is constitutionally infirm. Additionally, the Fifth Circuit's failure to address the issue of prosecutorial reference to excluded evidence denies RICHARD HOWARD EHLINGER due process of law.

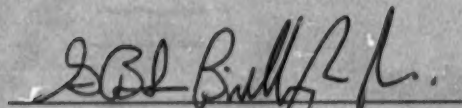
It is incumbent upon this Court to review the standard announced by Eleventh Circuit with regard to prosecutorial misconduct. The decision of the Eleventh Circuit in applying its standard of review and failure to address issues raised by the petitioner denied due process of law. This Court should correct the injustice done to the person improperly caught therein.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



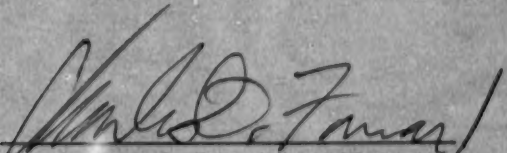
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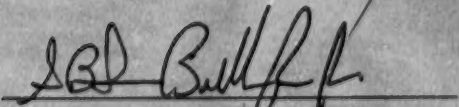
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 1982, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, D. C. 20530, and by hand to Assistant United States Attorney Bruce Zimet, 155 South Miami Avenue, Miami, Florida 33130. I further certify that all parties required to be served have been served.


CHARLES O. FARRAR, JR.


G. BARTRAM BILLBROUGH, JR.